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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT ANDREW FLORES, Defendant and Appellant.	G039845 (Super. Ct. No. 06NF1022) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance P. Jensen, Judge. Affirmed.

Law Offices of Robert C. Kasenow, II, and Robert C. Kasenow, II, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lynne McGinnis, Gary W. Brozio and Ronald Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant was convicted of molesting his 11-year-old stepdaughter F. He contends the trial court misinstructed the jury and should have declared a mistrial after the jury announced it was unable to reach a verdict. We reject these contentions and affirm the judgment.

FACTS

During 2005, appellant molested F. on five different occasions. Four of the incidents occurred at their residence while F. was watching television. Appellant would lie down next to F. and rub her stomach. Then he would expand the rubbing to her breasts and usually end up by touching her vagina.[1] The fifth incident occurred while F. was driving with appellant to Arizona. While she was relaxing in the passenger seat, he reached over and touched her breasts and vagina.

At first, F. was too scared to tell anyone about what appellant was doing to her. But she eventually told her sister and her friends, and they convinced her to tell her mother, D. When D. confronted appellant about the allegations, he initially denied any wrongdoing. But during a series of secretly-recorded phone calls, he reluctantly admitted to D. there were occasions when he rubbed F.'s stomach and touched her breasts. He also admitted he touched her vagina once. Appellant insisted, however, he derived no sexual pleasure from these actions. When D. asked him why, if that were the case, he touched F., appellant speculated it may have been a way for him to get back at D. for not treating him as nicely as he expected her to.

At trial, appellant testified he rubbed F.'s stomach to relax her, and in so doing, he may have inadvertently touched her breasts. He denied touching her vagina and insisted his actions were not done to arouse. He also called numerous character witnesses to support his claim that he was not the type of person who would molest a child.

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[1] F. testified appellant touched her vagina on all but one of the four occasions that occurred at their house.

Appellant was charged with five counts of committing a lewd act on a child under the age of 14. (Pen. Code, § 288, subd. (a).)[2] The jury convicted on four of the counts, and on the remaining one, it found appellant guilty of the lesser included offenses of assault and battery. Thereupon, the court sentenced appellant to three years in prison.

I

Appellant contends the trial court abused its discretion in failing to declare a mistrial after the jury signaled it was unable to reach a verdict. We disagree.

All told, the trial spanned nearly two weeks, with deliberations commencing on September 20, 2007. On that day, the jury requested and received a transcript of F.'s testimony and the secretly-recorded phone calls D. made to appellant.

The next day, the 21st, was a Friday. Throughout the course of this day, the jury signaled it was having difficulty understanding and applying CALCRIM No. 1110, which set forth the elements of the charged offense. The instruction stated, "The defendant is charged in count 1 with committing a lewd and lascivious act on a child under 14 years. To prove that the defendant is guilty of this crime, the People must prove, one, that the defendant willfully touched any part of a child's body either on the bare skin or on the clothing; two, the defendant committed the act with the intent of arousing, appealing to, or gratifying lusts or passions or sexual desires of himself or the child; the child was under the age of 14 at the time of the act. [¶] The touching need not be done in a lewd or sexual manner. Someone commits an act willfully when he or she does it willingly or on purpose. It does not require that he or she intend to break the law, hurt someone or gain an advantage. Actually arousing, appealing to, or gratifying lusts or passions or sexual desires of the perpetrator or child is not required."

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[2] That provision provides, "Any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ." (Pen. Code, § 288, subd. (a).)

The jury's first question about this instruction came on the morning of the 21st, when it asked the court to define the terms "intent," "lust," "passion" and "sexual desires." The court responded, "Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases are specifically defined in the jury instructions. Words and phrases not specifically defined in the jury instructions are to be applied using their ordinary, everyday meanings. CALCRIM 1110 (Penal Code 288(a)) further defines 'intent', willfully and all the elements required to prove a defendant guilty of the crime of Penal Code 288(a)."

A couple of hours later, the jury produced a note which provided, "In regards to intent, we have reached an impasse and need additional guidance." The court asked how it could be of assistance, and the jury wrote back, "If I do not believe that the intent was sexual in nature beyond a reasonable doubt, does one need to state an alternative intent?"

The court replied, CALCRIM No. 1110 "[p]rovides a list of alternative intents that the defendant may have possessed at the time of [the alleged acts]. You must not find the defendant guilty unless you all agree that the People have proven beyond a reasonable doubt that the defendant committed any [such] act with at least one of the listed alternative intents. [You] need not be unanimous as to which of the alternative intents the defendant had at the time of any given act, only that any one of the listed alternative intents was present."

Later that day, at 3:42 p.m., the jury announced it could not reach a unanimous decision. The court asked the foreperson if he believed there was anything that could be done to assist the jury in reaching a verdict, and the foreperson answered no. The court then turned to the full jury and asked, "[D]oes any member of the jury himself or herself believe that any further deliberation, instruction or reading of the testimony would assist the jury in reaching a verdict?" The court asked for a show of

hands and observed no hands were raised. It then learned from the foreperson that the jury had only taken one vote and that it was divided "10/2" on all counts.

Sensing it had been "a long day" for the jury, the court then asked if "it might be beneficial . . . to end a little early today, come back after a long restful weekend, and maybe go at it one more time on Monday?" The foreperson replied "it would not help," and the rest of the jurors nodded in agreement.

At that point, the prosecutor requested a sidebar and asked the court to poll the jurors individually. After defense counsel said she did not object to this procedure, the court granted the request and proceeded to asked each of the jurors whether they believed "any further deliberation, instruction or reading of testimony would assist the jury in reaching a verdict." Ten of the jurors said no, and two of them — Juror No. 1 and Juror No. 8 — said yes. Based on the jurors' responses, defense counsel asked the court to declare a mistrial. However, the court did not feel that was necessary. Instead, it dismissed the jurors for the day and ordered them to come back after the weekend for further deliberations. It also invited the jurors to think about ways in which the court might be able to assist them in reaching a verdict, such as providing further clarification on the their instructions.

When the jurors returned on Monday, they deliberated for about an hour before producing the following note: "There is some confusion concerning 'reasonable doubt' and the universe of possible intents. In this case, we have identified several different possible intents. [¶] . . . Are we to consider only the intents we heard stated in this courtroom to define and limit the universe of possible intents for us to consider, or, is an instinct that an alternative intent or motivation might exist — though it can not be stated clearly [—] enough to establish reasonable doubt[?]"

The court replied, "One of your many duties as a jury is to apply words and phrases used during this trial and apply them to their ordinary, everyday meanings as [well as] the meanings as defined in the instructions that have been given to you with the

hopes that you can reach a verdict. [¶] To lend assistance to your question, the Court will refer you to the following Jury instructions: CALCRIM 200 [duties of judge and jury], 220 [reasonable doubt], 225 [circumstantial evidence of intent], 1110 [elements of charged offense]." With that, the jury resumed its deliberations, and at 2:20 p.m. that day, it returned its verdict.

It is against this factual backdrop that we must assess appellant's claim the trial court effectively coerced the jury into reaching a verdict. Our analysis is guided by Penal Code section 1140, which states, "Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, *or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."* (Italics added.)

Speaking of this provision, our Supreme Court has explained, "'The determination whether there is a reasonable probability of agreement rests in the discretion of the trial court. [Citations.] The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment in favor of considerations of compromise and expediency." [Citation.]' [Citation.] The question of coercion is necessarily dependent on the facts and circumstances of each case. [Citation.]" (*People v. Sandoval* (1992) 4 Cal.4th 155, 195-196.)

Appellant contends the court abused its discretion by not declaring a mistrial after the jury announced it could not reach a verdict and both the foreperson and the jury as a whole indicated they did not believe further deliberations would be fruitful. Appellant contends it was unnecessary and unduly coercive to poll the jurors at this point, but we cannot see why, and we note that even appellant's own attorney did not see anything wrong with this. When the court asked defense counsel what she thought about the jury being polled, she answered, "I have no objection."

Counsel's acquiescence in the polling raises the issue of waiver. (See *People v. Wright* (1990) 52 Cal.3d 367, 415 [objections to polling process may be waived by defense counsel's failure to raise them in the trial court; *People v. Flynn* (1963) 217 Cal.App.2d 289, 294-295 [challenge to polling method was arguably waived where defense counsel acquiesced to method that was used in the trial court].) It also shows the decision to poll the jury was viewed as fair by the person charged with protecting appellant's rights at trial. Appellant does not contend his trial attorney was ineffective for failing to object to that decision below.

Nevertheless, appellant argues polling served no other purpose than to put the two holdout jurors on the spot and pressure them into changing their minds. We cannot agree. Polling is a time-honored method of allowing jurors to express their opinions directly to the court. It ensures that no matter what the jury purports to decide as a collective body, that each of the jurors individually agrees with that decision. (See *People v. Atkins* (1988) 203 Cal.App.3d 15, 26; *People v. De Soto* (1939) 33 Cal.App.2d 478, 481.) Therefore, "[o]rdinarily the trial judge should not discharge a jury on the ground that there is no reasonable probability that the jury can agree without questioning the jurors individually as to such probability. [Citations.]" (*Paulson v. Superior Court* (1962) 58 Cal.2d 1, 7.) Although the trial court is not *required* to do this, polling is the best method of ascertaining the jurors' feelings regarding the prospects for agreement. (*Id*. at pp. 7-8.) We cannot say the trial court abused its discretion by polling the jurors in this case.

Appellant also takes issue with the manner in which the court polled Juror No. 1. At first, the court asked Juror No. 1, "Do you believe that any further deliberation, instruction or reading of testimony would *assist the jury* in reaching a verdict?" (Italics added.) Juror No. 1 initially stated that more detailed instructions might be helpful, and then he asked for clarification regarding the court's inquiry. The court then told him, "The question was do you believe any further deliberation, instruction, or reading of

testimony would *assist you* in reaching a verdict? (Italics added.) Again, Juror No. 1 signaled in the affirmative.

Appellant argues it was wrong for the court to substitute "assist you" for "assist the jury" in the second question because the real issue was the likelihood of the jury as a whole being able to reach a verdict, and not Juror No. 1 personally. However, it is quite possible that in using the word "you," the court was actually referring to the jury as a whole and not just Juror No. 1. English does not have a distinct second person plural pronoun; "you" has to serve for both singular and plural references. Several of the court's instructions used the word "you" in explaining to the jury how it should go about deciding the case. In any event, the remark in question was brief and isolated, and it does not strike us as one that would cause a reasonable juror to abandon his or her independent judgment for the sake of compromise and expediency. There was nothing unfair or coercive about the court's polling methods in this case.

In reviewing the court's actions, it is also significant that the jury had been deliberating for only two days when it reported being deadlocked. That is not a very long time compared to other cases in which trial courts have properly ordered deliberations to continue. (See, e.g., *People v. Sandoval*, *supra*, 4 Cal.4th at pp. 194-197 [trial court did not abuse its discretion in ordering deadlocked jury to continue deliberations after five days of deliberations]; *People v. Rodriguez* (1986) 42 Cal.3d 730, 774 [same where jury had been deliberating for 11 days].)

Still, appellant argues the court should have concluded that deliberations had run their course by the second day because the case was relatively simple and it revolved solely around the issue of his intent. We disagree. Appellant's intent may have been the thorniest issue in the case, but there was also conflicting evidence as to which parts of F.'s body appellant touched and how often he touched them. Moreover, it is clear from the jury's notes it was having a difficult time understanding the requisite intent for the charged offense and applying it to the facts at hand. After the court's attempts at

clarification, it was reasonable to give the jury time to be sure it understood the definition of the intent required before it tried to determine whether appellant had it. We think the trial court acted well within its discretion in deciding how much time the jury should have to work through these issues. (*People v. Rodriguez*, *supra*, 42 Cal.3d at p. 774 [trial court could reasonably find further deliberations might be fruitful where deliberations "had been punctuated by the reading of testimony and three supplemental charges to aid the jury in its task"].)

At bottom, it appears to us that rather than pressuring the jury to decide the case on the information it had already provided, the court made a reasonable effort to find out what it could do to enhance the jury's understanding of the case. In that process, the court learned the jurors had only voted once, they were split 10 to 2, and two of them believed further deliberations might be fruitful. Considering all of the circumstances that were presented, the court acted appropriately in denying appellant's request for a mistrial and ordering further deliberations. No abuse of discretion has been shown.

II

Appellant also contends the court failed to properly instruct the jury that its verdict must be unanimous. More particularly, he claims the court's instructions allowed the jurors to conclude that once "they agreed that [he] committed one specific [lewd] act, that they were free to convict [him] of any and all counts even though [they] may have disagreed as to the relevant conduct that constituted those subsequent counts." The claim is not well taken.

Per CALCRIM No. 3500, the trial court instructed the jury that appellant was charged with five counts of committing a lewd act upon a child under 14. Pursuant to that instruction, the court further instructed, "The People have presented evidence of more than one act to prove that the defendant committed *this offense*. You must not find the defendant guilty unless you all agree that the People have proved that the defendant

committed at least one of these acts and you all agree on which act he committed." (Italics added.)

In responding to one of the jury's questions about intent, the court also stated, "You must not find the defendant guilty unless you all agree that the People have proven beyond a reasonable doubt that the defendant committed *any act* with at least one of the listed alternative intents. [You] need not be unanimous as to which of the alternative intents the defendant had at the time of *any given act*, only that any one of the listed alternative intents was present." (Italics added.)

According to appellant, these instructions failed to convey the central point that jury unanimity as to the alleged act was required for each and every count. He fears that by using the terms "this offense" and "any act" the court diluted this requirement and improperly suggested to the jurors that they could convict him on all counts, so long as they unanimously agreed he committed but a single act of lewd conduct. Viewing the record as a whole, we do not believe there is a reasonable likelihood the jury interpreted the court's instructions in this fashion.

For starters, the charges, presentation of evidence and instructions all made it clear that appellant was being tried for five separate counts of lewd conduct that occurred on five separate occasions. It simply would not be logical for the jurors to believe that it was required to reach unanimity as to which act appellant committed on one of the counts, but not the other four.

Moreover, there is nothing about the particular wording of the challenged instructions that would have led the jury in this direction. Although the instructions referred to "this offense" and "any act," they were preceded by the court's reminder that appellant was charged with five separate counts of lewd conduct. So, in applying the legal principles contained within those instructions, the jury would have been inclined to apply them to each and every count. Having studied the wording of the instructions

carefully, and viewing them in context of the entire charge, we are just unable to conclude otherwise.

It is also worth noting that in closing argument, the prosecutor properly explained that CALCRIM No. 3500 was required because the evidence showed "multiple touchings occurr[ed] *at each event*." (Italics added.) This reinforced the notion that the jury had to agree on which act or acts appellant committed with respect to every count. At no point did the prosecutor imply that jury unanimity about appellant's conduct as to one count obviated the need for unanimity about appellant's conduct as to the remaining counts.

Considering all the information the jury was provided, it is not reasonably likely the jury misunderstood the unanimity requirement in the manner appellant contends. Therefore, we reject his claim that the court's instructions on unanimity were misleading.

III

Next, appellant asserts the trial court's responses to the jury's questions about so-called "alternative intents" lowered the prosecution's burden of proof. But we don't see how.

In its general charge to the jurors, the court told them per CALCRIM No. 1110 that in order to prove appellant guilty, the People must prove, inter alia, that he touched the victim's body "with the intent of arousing, appealing to, or gratifying lusts or passions or sexual desires of himself or the child[.]" During deliberations, the jury made it clear it was struggling with this requirement, and at one point it produced a note that read, "If I do not believe that the intent was sexual in nature beyond a reasonable doubt, does one need to state an alternative intent?"

In response, the court said that CALCRIM No. 1110 "[p]rovides a list of alternative intents that the defendant may have possessed at the time of [the alleged] act

. . . . You must not find the defendant guilty unless you all agree that the People have proven beyond a reasonable doubt that the defendant committed any act with at least one of the listed alternative intents. The jury need not be unanimous as to which of the alternative intents the defendant had at the time of any given act, only that any one of the listed alternative intents was present."

Later on, the jury wrote the court saying, "There is some confusion concerning 'reasonable doubt' and the universe of possible intents. In this case, we have identified several different possible intents. [¶] . . . Are we to consider only the intents we heard stated in this courtroom to define and limit the universe of possible intents for us to consider, or, is an instinct that an alternative intent or motivation might exist — though it can not be stated clearly [—] enough to establish reasonable doubt[?]"

The court answered, "One of your many duties as a jury is to apply words and phrases used during this trial and apply them to their ordinary, everyday meanings as [well as] the meanings as defined in the instructions that have been given to you with the hopes that you can reach a verdict. [¶] To lend assistance to your question, the Court will refer you to the following Jury instructions: CALCRIM 200 [duties of judge and jury], 220 [reasonable doubt], 225 [circumstantial evidence of intent], 1110 [elements of charged offense]."

Appellant contends the court's responses were inadequate because they failed to inform the jurors that they could not consider intents that are not listed in CALCRIM No. 1110, what the jury referred to as "alternative intents." At oral argument, he characterized this as "punting" the question.

We do not see it that way. As we see it, the court reminded the jury to use ordinary common sense meanings of words and then referred them back to CALCRIM No. 1110, which clearly provides that conviction is not possible unless the jury finds beyond a reasonable doubt "that the defendant committed any act with at least one of the *listed* alternative acts." We do not see this as a punt. It strikes us more as a conservative,

"three yards and a cloud of dust" response – much preferable to the "Hail Mary" of an instruction diagrammed in 15 minutes in chambers as the clock ran out. The court's answer clearly steered them back to the intents set out in the jury instructions, and could not have left any doubt that *only* one of the listed intents would suffice for conviction.

IV

Lastly, appellant contends the court erred in giving CALCRIM No. 362. Once again, we disagree.

Pursuant to that instruction, the court told the jury, "If the defendant made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

Appellant contends the instruction was unwarranted because he never made a false statement for the purpose of deflecting suspicion from himself. (See *People v. Rankin* (1992) 9 Cal.App.4th 430, 436.) However, during pretrial telephone calls with F.'s mother, he initially denied any wrongdoing before grudgingly admitting he touched F. on her breasts and vagina. And even then, he minimized his conduct by denying the touching was done for sexual pleasure. This is sufficient evidence from which the jurors could conceivably find that appellant lied to protect himself. Therefore, the court properly gave CALCRIM No. 362; no instructional error has been shown.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.